Goi Ching Ang v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–46 OF 1993

EUSOFF CHIN CHIEF JUSTICE, CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR, MOHAMED DZAIDDIN AND WAN ADNAN FCJJ

2 MARCH 1999

Evidence *— Confession — Information leading to fact discovered — Admissibility of statement — Trial judge doubted voluntariness of accused's information — Whether information could be admitted as evidence notwithstanding that it was involuntarily made — Whether trial judge had discretion to exclude evidence prejudicial to accused even though evidence may be technically admissible — Evidence Act 1950 s 27*

Evidence *— Confession — Information leading to fact discovered — Whether subject to Evidence Act 1950, s 24 — Evidence Act 1950 s 27*

Evidence *— Privilege — Self-incrimination, against — Whether admitting appellant's s 27 information would infringe principle of right against self-incrimination when there was no evidence of s 112(ii),(iii) & (iv) of Criminal Procedure Code (FMS Cap 6) having been complied with*

The appellant was convicted of two charges under the Internal Security Act 1960 for having in his possession or control firearms and ammunition without lawful authority. The prosecution's case rested mainly on the evidence of PW5 and PW7 who testified on the discovery of the incriminating firearms and ammunition in the appellant's rented house as a result of information given by the appellant himself during his interrogation by PW5 ('the s 27 information'). The trial judge, despite his doubts as to the voluntary nature of the s 27 information, ruled that the information was admissible in evidence under s 27 of the Evidence Act 1950 ('the Act'). Consequently, he found the appellant guilty and sentenced him to death in respect of the first charge and suspended sentencing on the second charge. The appellant appealed to the Federal Court. Counsel for the appellant, relying on the authority of *Md Desa bin Hashim v PP* [1995] 3 MLJ 350 ('*Md Desa*'), contended that in order to render information under s 27 of the Act admissible, it must have been made voluntarily. The deputy public prosecutor however submitted that voluntariness was not a condition under s 27 and even if the information was given involuntarily, it would still be admissible under s 27. According to the learned deputy, s 27 was intended to be an exception to the prohibitions imposed by ss 24, 25 and 26 of the Act. The learned deputy also sought to distinguish *Md Desa* on its facts.

Held, allowing the appeal, quashing the conviction and setting aside the sentence:

(1) The case of *Md Desa* was distinguishable on its facts. In *Md Desa* the admissibility of the s 27 statement was objected to by the defence at the trial but the objection was overruled by the trial

judge. However, in the instant appeal, the trial judge, having on his own volition entertained doubt as to the voluntary nature of the s 27 information, nevertheless ruled that the information was admissible, irrespective of its voluntary character (see p 516F–H); *Md Desa bin Hashim v PP* [1995] 3 MLJ 350 distinguished.

(2) Prior to *Md Desa*'s case, the Malaysian courts had persistently held to the effect that s 27 was not subject to s 24 of the Act. Once information was proved to be within the province of s 27, the trial court would admit it in evidence notwithstanding that the information might not have been given voluntarily (see pp 520I and 521A–B). Any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the legislature (see p 524B).

(3) There is a vested discretion in a trial judge to exclude evidence which is prejudicial to an accused even though the said evidence may be technically admissible. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining s 27 information are scrupulously followed (see pp 526C–D and 527C–D).

(4) Admitting the s 27 information would infringe the principle of the right against self-incrimination since there was no evidence of s 112(ii), (iii) and (iv) of the Criminal Procedure Code (FMS Cap 6) having been complied with. Since the trial judge had not exercised his discretion to exclude the s 27 information, the appellate court would be at liberty to do so (see p 527E–G).

(5) With the exclusion of the s 27 information, there was no or insufficient evidence to justify the conviction of the appellant on the first charge. With regard to the second charge, there was also no or insufficient evidence to sustain the conviction. Thus the convictions should be quashed and the sentence imposed set aside. On the facts also, this was not a proper case for ordering a retrial (see pp 527H–I and 528A–B).

[Bahasa Malaysia summary

Perayu telah disabitkan atas dua pertuduhan di bawah Akta Keselamatan Dalam Negeri 1960 kerana memiliki atau mengawal senjata api dan amunisi tanpa kebenaran sah. Kes pihak pendakwa bersandang terutamanya atas keterangan SP5 dan SP7 yang memberi keterangan mengenai penemuan senjata api dan amunisi yang menunjukkan perayu bersalah di rumah perayu yang disewa berikutan maklumat yang diberikan oleh perayu sendiri semasa soal siasat oleh SP5 ('maklumat s 27'). Walaupun hakim perbicaraan meragui

kesukarelaan maklumat s 27, beliau telah memutuskan bahawa maklumat tersebut boleh diterima sebagai keterangan di bawah s 27 Akta Keterangan 1950 ('Akta tersebut'). Kemudiannya, beliau mendapati perayu bersalah dan menjatuhkan hukuman mati berkenaan dengan pertuduhan pertama dan menggantung hukuman atas pertuduhan kedua. Perayu merayu kepada Mahkamah Persekutuan. Peguam perayu, bergantung kepada autoriti *Md Desa bin Hashim v PP* [1995] 3 MLJ 350 ('*Md Desa*'), berhujah bahawa bagi menjadikan maklumat di bawah s 27 Akta tersebut boleh diterima, ia mestilah telah dibuat secara sukarela. Namun demikian timbalan pendakwa raya berhujah bahawa kesukarelaan bukanlah satu syarat di bawah s 27 dan biarpun maklumat diberikan secara tidak sukarela, ia masih boleh diterima di bawah s 27. Menurut timbalan yang arif, s 27 bertujuan sebagai satu kecualian kepada larangan yang dikenakan oleh ss 24, 25 dan 26 Akta tersebut. Timbalan yang arif juga cuba membezakan *Md Desa* atas fakta-faktanya.

Diputuskan, membenarkan rayuan, membatalkan sabitan dan mengetepikan hukuman:

(1) Kes *Md Desa* boleh dibezakan atas fakta-faktanya. Dalam *Md Desa* kebolehterimaan pernyataan s 27 telah dibantah oleh pembelaan di perbicaraan tetapi bantahan telah ditolak oleh hakim perbicaraan. Walau bagaimanapun dalam rayuan ini, hakim perbicaraan, yang sendirinya meragui maklumat s 27 diberi secara sukarela, masih memutuskan bahawa maklumat tersebut boleh diterima, tanpa mengira sifat sukarelanya (lihat ms 516F–H); *Md Desa bin Hashim v PP* [1995] 3 MLJ 350 dibeza.

(2) Sebelum kes *Md Desa*, mahkamah-mahkamah Malaysia telah sering memutuskan bahawa s 27 tidak tertakluk kepada s 24 Akta tersebut. Sebaik sahaja maklumat dibuktikan diliputi oleh s 27, mahkamah perbicaraan akan menerimanya tanpa mempedulikan bahawa maklumat tersebut mungkin tidak diberikan secara sukarela (lihat ms 520I dan 521A–B). Sebarang penyimpangan daripada tafsiran kehakiman mantap yang dinyatakan dalam banyak keputusan mahkamah haruslah diserahkan kepada badan perundangan (lihat ms 524B).

(3) Terdapat satu budi bicara yang diletakhak dalam hakim perbicaraan untuk mengecualikan keterangan yang menjejaskan seseorang tertuduh walaupun keterangan tersebut boleh diterima secara teknikal. Keterangan yang diperolehi dalam cara yang menindas atau bertentangan dengan hasrat seseorang tertuduh atau melalui penipuan atau kelakuan yang tidak harus dipergunakan oleh pihak polis, akan beroperasi secara tidak adil terhadap tertuduh dan seharusnya tidak diterima atas budi bicara mahkamah. Mahkamah haruslah memastikan bahawa taraf-taraf kewajaran dalam memperolehi maklumat s 27 dipatuhi dengan ketat (lihat ms 526C–D dan 527C–D).

(4) Penerimaan maklumat s 27 akan melanggar prinsip hak terhadap pembabitan diri oleh kerana tiada keterangan bahawa s 112(ii), (iii) dan (iv) Kanun Acara Jenayah (NMB Bab 6) telah dipatuhi. Oleh kerana hakim perbicaraan telah tidak melaksanakan budi bicara beliau untuk mengecualikan maklumat s 27, mahkamah rayuan bebas untuk berbuat demikian (lihat ms 527E–G).

(5) Dengan pengecualian maklumat s 27, tiada keterangan atau keterangan yang mencukupi untuk menjustifikasikan sabitan perayu atas pertuduhan pertama. Berhubung dengan pertuduhan kedua, juga tidak terdapat keterangan atau keterangan yang mencukupi untuk mengekalkan sabitan. Justeru itu, sabitan-sabitan haruslah dibatalkan dan hukuman diketepikan. Atas fakta-fakta juga, ini bukanlah satu kes yang wajar untuk memerintahkan perbicaraan semula (lihat ms 527H–I dan 528A–B).]

Notes

For cases on information leading to fact discovered, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 436–442.

For cases on privilege against self-incrimination, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1394–1400.

Cases referred to

Chan Chwen Kong v PP [1962] MLJ 307 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)
Chandrasekaran & Ors v PP [1971] 1 MLJ 153 (refd)
Chong Soon Koy v PP [1977] 2 MLJ 78 (refd)
Harris v Director of Public Prosecutions [1952] 1 All ER 1044 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Kan Sik Fong v PP [1961] MLJ 163 (refd)
Kurumason of Kaniu v R [1955] 1 All ER 236 (refd)
Lee Kok Eng v PP [1976] 1 MLJ 125 (refd)
Md Desa bin Hashim v PP [1995] 3 MLJ 350 (distd)
Mohd Affandi bin Abdul Rahman v PP [1998] 1 MLJ 537 (refd)
Maznah bte Ismail & Anor v PP CA No 45–1–94 (unreported) (refd)
Noor Mohamed v R [1949] AC 182, 1 All ER 365 (refd)
Packiam & Anor v PP [1972] 1 MLJ 247 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137 (refd)
PP v Chin Moi Moi [1995] 1 SLR 297 (refd)
PP v Er Ah Kiat [1966] 1 MLJ 9 (refd)
PP v Haji Kassim [1971] 2 MLJ 115 (refd)
PP v Sandra Margaret Birch [1977] 1 MLJ 129 (refd)
PP v Toh Ah Keat [1977] 2 MLJ 87 (refd)
Pulukuri Kotayya v King Emperor AIR 1947 PC 67, 74 IA 65 (refd)
R v Barker [1941] 2 KB 381 (refd)
R v Gould (1840) 9 C & P 364, 173 ER 870 (refd)
R v Hunt [1987] AC 352 (refd)
R v Murugan Ramasamy [1965] AC 1 (refd)

Ramkishan Mithanlal Sharma & Ors v State of Bombay AIR 1955 SC 104 (refd)
Rauf bin Haji Ahmad v PP [1950] MLJ 190 (refd)
Sum Kum Seng v PP [1981] 1 MLJ 244 (refd)
Tan Buck Tee v PP [1961] MLJ 176 (refd)
Tan Geok Kwang v PP [1949] MLJ 203 (refd)
Vijay Kumar v State of Himachal Pradesh (1978) Crim LJI 1619 (refd)
Wai Chan Leong v PP [1989] 3 MLJ 356 (refd)
Woolmington v The Director of Public Prosecutions [1935] AC 462 (refd)
Yau Heng Fang v PP [1985] 2 MLJ 335 (refd)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Legislation referred to

Anti-Corruption Act 1997 s 45
Code of Criminal Procedure 1938 s 122(3) [Ceylon]
Constitution of Singapore arts 9(1), 12(1)
Criminal Procedure Code (FMS Cap 6) ss 112(ii), (iii), (iv), 113
Dangerous Drugs Act 1952 s 37A
Evidence Ordinance 1938 s 27 [Ceylon]
Evidence Act 1950 ss 24, 25, 26, 27
Federal Constitution arts 5(1), 8(1)
Indian Evidence Act (1 of 1872) ss 24, 27 [Ind]
Indian Criminal Procedure Code (Act XXV of 1861) s 150 [Ind]
Internal Security Act 1960 ss 57(1)(a), (b), 75
Police and Criminal Evidence Act 1984 ss 76, (5), 82 [Eng]
Prevention of Corruption Act 1961 s 15
Taxes Management Act 1970 s 105 [Eng]
Police and Criminal Evidence Act 1984 [Eng]

Appeal from: Criminal Trial No 57–1 of 1988 (High Court, Shah Alam)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Azahar bin Mohamed (*Deputy Public Prosecutor*) for the respondent.

Cur Adv Vult

Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the court): The appellant was initially charged in the High Court of Malaya in Shah Alam with three charges under the Internal Security Act 1960. As he had been acquitted and discharged of the third charge, nothing more need be said about it. The first and the second charges read:

(i) Charge 1:

Bahawa kamu pada 24 Jun 1988, jam lebih kurang 7.00 petang bertempat di rumah No 65 Jalan SJ 32, Taman Selayang Jaya, Selayang, di dalam Daerah Gombak, di dalam Negeri Selangor Darul Ehsan, iaitu satu kawasan keselamatan sepertimana yang diisytiharkan oleh Yang DiPertuan Agong mengikut pengistiharan PU(A) 148 bertarikh 15 Mei 1969, tanpa alasan yang sah telah ada di dalam milik kamu:

(i) sepucuk revolver jenis Smith & Wesson .38 Mod 36 2' No siri 539639. A

(ii) sepucuk revolver jenis Smith & Wesson .38 Mod 10-5 2' No siri 46597;

(iii) sepucuk revolver jenis Colt Cobra .38 No siri 5/1013

tanpa kuasa yang sah dan dengan itu kamu telah melakukan satu kesalahan di bawah s 57(1)(a) Akta Keselamatan Dalam Negeri 1960, dan boleh dihukum di bawah s 57(1) Akta yang sama. B

(ii) Charge 2:

Bahawa kamu pada 24 Jun 1988, jam lebih kurang 7 petang bertempat di rumah No 65, Jalan SJ 32, Taman Selayang Jaya, Selayang, di dalam Daerah Gombak, di dalam Negeri Selangor Darul Ehsan, iaitu satu kawasan keselamatan sepertimana yang diisytiharkan oleh Yang DiPertuan Agung mengikut pengisytiharan PU (A) 148 bertarikh 15 Mei 1969, tanpa alasan yang sah telah ada di dalam milik kamu amunisi, iaitu sejumlah 51 butir peluru hidup jenis .38 special, tanpa kuasa yang sah dan dengan itu kamu telah melakukan satu kesalahan di bawah s 57(1)(b) Akta Keselamatan Dalam Negeri 1960 dan boleh dihukum di bawah s 57(1) Akta yang sama. C D

At the close of the case for the prosecution on 19 February 1992, the learned trial judge called for the defence respecting the first and the second charges. The appellant elected to give sworn evidence and called three other witnesses to support his defence. On 12 June 1993, the learned trial judge found the appellant guilty of both charges and sentenced him to death in respect of the first charge. Sentencing on the second charge was suspended. Against the said convictions and sentence, the appellant appealed to the Federal Court. E

The prosecution's case F

The case for the prosecution rests mainly on the evidence of two key witnesses, PW5 (ASP Hanafiah bin Mohd Nor) and PW7 (Detective Constable Loh Choo Haw). Their evidence revealed that on 24 June 1988, PW5 interrogated the appellant with the help of an interpreter, PW7. The appellant as well as four others had earlier been arrested on suspicion of committing armed robbery in Cheras, Selangor. G

In the course of interrogating the appellant on 24 June 1988, PW5, through PW7 who spoke to the appellant in a mixture of Teochew, Hokkien and Cantonese, asked the appellant where he had kept the pistols. The appellant's answer, likewise translated, was: 'Saya ada simpan tiga pistol dalam rumah saya di Selayang'. PW5 further asked the appellant, through PW7: 'Boleh tunjuk?' and the appellant allegedly answered: 'Boleh'. Immediately thereafter a police party headed by PW5, including PW7, took the appellant to the appellant's rented house at No 65, Jalan SJ 32, Taman Selayang Jaya, Selayang, Selangor. According to both PW5 and PW7, when the police party and the appellant reached the house at about 7 pm that same day, they discovered that the front door was locked. PW5 testified that, with the appellant's permission, one Detective Corporal Raja Kopal H I

A forced open the front door. As soon as they entered the house, PW5 asked the appellant, through PW7, to show him where the pistol was kept. The appellant gesticulated with his mouth in the direction of a mini compo radio on the floor of the sitting room. Then, PW5 asked the appellant: 'Di mana pistol tersebut?'. The appellant answered: 'Pistol disimpan dalam speaker box mini compo itu.' Both the question and answer were given through the B interpretation of PW7.

In the appellant's presence, PW5 proceeded to open the left speaker of the said mini compo with the assistance of Detective Corporal Raja Kopal and found inside it three pistols and 51 rounds of ammunition (the subject matters of the first and the second charges respectively). At the time of the C discovery, all the three pistols were loaded with ammunition. PW5 testified that the appellant's answer in response to the interrogation in the latter's rented house which led to the discovery of the incriminating articles was reduced by him (PW5) into writing in his note book (exh P19).

The appellant was then taken back to the police headquarters where he together with the exhibits seized were handed over to the investigating D officer of this case, PW10 (Inspector Mohd Husin bin Mohd Yusuf).

At the trial, an armoury officer, PW3 (ASP Syed Mustaffa bin Syed Nordin) also testified that after receiving the exhibits in this case, ie the arms and ammunition from PW10, he test fired all the three revolvers and found them to be in good working condition, ie serviceable. Likewise, the test he E conducted on the ammunitions showed that they were also live.

Thus, in the main, the case for the prosecution rested on the evidence of PW5 and PW7 who testified on the discovery of the incriminating firearms and ammunition in the appellant's rented house as a result of the information given by the appellant himself during his interrogation by PW5.

F

The appellant's defence

In his sworn testimony, the appellant said he was arrested on 23 June 1988 when he went to the house of a friend, Lim Bak Hai. At the time of his arrest, one Wong Weng Fook alias Shan Tung and Lim had already been G arrested, and an hour later another two suspects, Pui Kia and Teik Lee, were also brought to Lim's house in handcuffs.

The appellant claimed that one or two days after his arrest at about 6 pm, whilst being blindfolded, he was brought together with Shan Tung to his rented house. After the blindfold on him was taken off, he saw laying out on the floor of the sitting room pistols and ammunition. After that, he was H taken back to the police headquarters at Shah Alam.

The appellant denied ever telling PW5, through PW7, that he had kept the three pistols in his house in Selayang or that he had agreed to show PW5 where he kept them. He also denied showing them where he kept the pistols by gesticulating with his mouth in the direction of the mini compo and I telling PW5 that the pistols were kept in the speaker box of the mini compo. The appellant said he had no knowledge of the firearms and the ammunitions seized from the house and had never seen the said mini compo

in his sitting room before. He alleged that the mini compo belonged to Shan Tung, who, according to him, occasionally stayed in the same house with him. A

Under cross-examination, the appellant said only he and his girlfriend were the permanent occupants of the house but a number of his other friends, including Shan Tung, sometimes came and stayed there. B

The evidence of a defence witness DW3, Lim Bak Hai, is of some significance. DW3 was arrested together with the appellant and the others. According to DW3, after their arrests and whilst the police were searching his house, Shan Tung, who was seated next to him, told him not to worry as the incriminating articles were in the house of the appellant. DW3 also claimed that after his arrest, he was tortured by the police and that since he could not stand the beatings, he had told the police that the pistols were in the appellant's house, as revealed to him by Shan Tung. DW3 also said he gave the police the address of the appellant's rented house. C

In summary, it could be said that the gist of the appellant's defence was to pin the ownership of the said incriminating exhibits and the blame on his friend, Shan Tung, who, he claimed, occasionally stayed in his rented house. D

Learned trial judge's judgment

In his judgment, the learned trial judge acknowledged that the evidence linking the appellant to the incriminating exhibits was the statement made by the latter, under s 27 of the Evidence Act 1950, to PW5 through the interpretation of PW7. The learned trial judge, despite the challenge by the defence, accepted the evidence of PW5 and PW7 and found that the statements were recorded by PW5 in his note book, exh P19, and were made by PW5 personally. E F

On the said evidence, the learned trial judge found that the prosecution had proved its case against the appellant in respect of the first and the second charges beyond reasonable doubt.

The learned trial judge disbelieved the defence story that Shan Tung stayed in the said house and that the mini compo (exh P21) belonged to him. The learned trial judge accepted the evidence of PW5, which he found to be supported by PW7 and exh P19, that the appellant had admitted keeping three pistols in the rented house and had informed PW5, by words and gesture, that the pistols were kept in the speaker box of the mini compo. The learned trial judge rejected the defence version that DW3 had informed the police about the pistols being in the appellant's house some $4^1/_2$ hours prior to the appellant making known of the whereabouts of the pistols. G H

The appeal

The appeal was centered upon the scope and application of s 27 of the Evidence Act 1950 in relation to the admissibility of the information given by the appellant to PW5 as to the whereabouts and the location of the three pistols in the rented house. I

A For the appellant, Mr Karpal Singh contended that the information given by the appellant leading to the discovery of the pistols and the ammunition (for brevity, 'the s 27 information') ought to have been excluded in evidence. Reliance was placed on *Md Desa bin Hashim v PP* [1995] 3 MLJ 350 (FC) which held, inter alia, that in order to render an information under s 27 of the Evidence Act 1950 admissible, it must have B been made voluntarily, and that upon a challenge being made promptly respecting the voluntariness of the information, the trial judge must determine the issue upon the voire dire. Counsel also sought to distinguish *Mohd Affandi bin Abdul Rahman v PP* [1998] 1 MLJ 537 and *Maznah bte Ismail and Anor v PP* CA No 45-1-94 (unreported) where the Court of C Appeal held that timely objection must be raised if it were intended to challenge the voluntariness of a s 27 information, and that it was too late to raise such issue at the appellate stage. Counsel pointed out that in our instant case, since the learned trial judge had, on his own accord, entertained doubt as to the voluntariness of the appellant's s 27 information, the learned trial judge ought to have ruled the information D inadmissible. It is opportune at this stage to note that the prosecution founded its convictions on both charges on the s 27 statement without which there would have been no case against the appellant.

For the respondent, the learned deputy public prosecutor submitted firstly, that voluntariness was not a condition under s 27 and secondly, that s 27 was intended to be an exception to the prohibitions imposed by ss 24, E 25 and 26 of the Evidence Act 1950. Accordingly, he contended that even if the information was given involuntarily, it would still be admissible under s 27. As regards *Md Desa*, the learned deputy public prosecutor contended that that case was distinguishable on the facts and that the remarks of the Federal Court by Gopal Sri Ram JCA on the need to prove voluntariness of F a s 27 information before admitting it, was obiter.

To facilitate easier understanding of the arguments, we reproduce below ss 24 and 27 of the Evidence Act 1950, skipping ss 25 and 26 thereof which are not relevant to the issue at hand.

Section 24 provides:

G > A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any H advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

Section 27 provides:

> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police I officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.
>
> (2) (Repealed).

In *Md Desa*, Md Desa was charged with two offences of having in his control a revolver and seven bullets under s 57(1)(a) and (b) of the Internal Security Act 1960 respectively. During the interrogation after his arrest, he revealed, inter alia, that he had kept the pistol covered with grass by a river-bank at Hutan Aji, Perlis, which he agreed to show to the police ('the first statement'). The interrogating officer wrote down the statement. Shortly thereafter, Md Desa led the police to the place mentioned by him and pointed to a spot, saying: '*Di situ saya simpan beg yang mengandungi pistol*' (the second statement). He then parted some of the bushes and the interrogating officer found, among them, a black bag containing a plastic bag in which the pistol and the bullets were found.

Upon objection by counsel for Md Desa, the trial judge of the High Court allowed certain words in the first statement to be expunged. Objection to admit the second statement in evidence was, however, overruled, and the second statement was admitted.

At the close of the prosecution's case, defence was called. Md Desa gave sworn evidence. His defence was a complete denial. He denied having made the first statement and having led the police to discover the above offending exhibits. He said that he was taken to the scene and was forced to pose for several photographs to be taken.

The defence was rejected and Md Desa was convicted of the two charges and sentenced according to law.

On appeal to the Federal Court, the convictions were quashed and the sentence, set aside. It was held that before admitting a statement under s 27 of the Evidence Act 1950, whether the statement amounted to a confession or not, it must, upon objection as to its admissibility being promptly taken by the defence in the proceedings, firstly be proved that the statement had been made voluntarily.

Reverting to the submission of the learned deputy public prosecutor that *Md Desa* is distinguishable on its facts and that the comment of Gopal Sri Ram JCA on the operation of s 27 was obiter, we would agree with the former part of the submission but not the latter. As may be seen from the above, the conviction in *Md Desa* rested substantially on the s 27 statement, the admissibility of which was objected to by the defence at the trial and the objection was overruled by the learned trial judge. Therefore, the issue of s 27 formed the crux of the prosecution's case in *Md Desa*. We would, however, agree with the deputy public prosecutor that *Md Desa* is distinguishable in that in our present case under appeal, the learned trial judge, on his own volition, entertained doubt as to the voluntary nature of the appellant's s 27 information, and yet, despite that, ruled that the information was admissible in evidence under s 27 of the Evidence Act 1950 irrespective of its voluntary character or otherwise.

Second charge — Possession of 51 live bullets

We consider it convenient at this stage to dispose of the second charge of possession of 51 live bullets upon which the appellant was convicted. On the facts and circumstances of this case, there is, in our view, no or insufficient

A evidence to sustain the conviction. No dissertation is required of the firmly established principle that the burden of proving the guilt of an accused lies on the prosecution and remains there throughout the trial: *Woolmington v The Director of Public Prosecutions* [1935] AC 462, *R v Hunt* [1987] AC 352 (HL); *Chan Chwen Kong v PP* [1962] MLJ 307 (CA); *Tan Buck Tee v PP* [1961] MLJ 176 at p 179 (CA); *Yau Heng Fang v PP* [1985] 2 MLJ 335 at
B pp 339–340 (SC). As stated earlier in this judgment, the only evidence from the prosecution purporting to connect the appellant to the second charge is his s 27 information. The information, however, made no mention at all of the bullets. Factually, the 51 bullets (inclusive of the comparative few inside the pistol chambers) were accidentally discovered because they happened to
C be inside the same speaker box of the mini compo in which the pistols were found and not as a result of any s 27 information to that effect. Further, it was not disputed that the appellant's girlfriend stayed with him in the said house. Therefore, on the evidence it cannot be said to have been established beyond reasonable doubt that it was the appellant who placed the 51 bullets inside the speaker box. The conviction on the second charge is accordingly
D quashed. No order for setting aside sentence is necessary as no sentence on the charge had been passed.

Sections 24 and 27 of the Evidence Act 1950

Delivering the judgment of the court in *Md Desa*, Gopal Sri Ram JCA said
E (at pp 359–360):

> Fifthly, in a number of Indian cases, it has been held that the rule permitting admissibility contained in s 27 is an exception to the prohibition appearing in the two sections that immediately precede it but does not qualify the all pervading qualification enacted in s 24: see *Ramkishan Mithanlal Sharma & Ors v State of Bombay* AIR 1955 SC 104; *Vijay Kumar v State of Himachal*
> F *Pradesh* (1978) Crim LJI 1619. The former decision was applied in *Yee Ya Mang v PP* [1972] 1 MLJ 120. The decisions of the Privy Council in *R v Ramasamy* [1965] AC 1 at p 13 and of Chang Min Tat J (as he then was) in *Packiam & Anor v PP* [1972] 1 MLJ 247 appear to support the proposition. Put in another fashion, the principle is that ss 25 and 26 are subject to s 27 but all these three ss are governed by and are subject to s 24.
>
> G We have no difficulty in affirming the correctness of the proposition as stated in the Indian cases to which we referred a moment ago. Having regard to the language of each of the sections which we have set out and the sequence in which they have been legislatively framed, it is abundantly clear, in our judgment, that in order for a confession or other statement or information to qualify for admission under s 27, it must have been made voluntarily. A
> H discovery made in consequence of a confession extracted by illegitimate means in the sense described in s 24 is inadmissible. When a challenge is taken as to the voluntariness of the information, it is imperative for a trial judge to determine that issue upon the voire dire.

In *Ramkishan Mithanlal Sharma & Ors v State of Bombay* AIR 1955 SC 104,
I Ramkishan and some others were convicted by the Sessions Court of Bombay of the offence of dacoity, using deadly weapons whilst committing the offence, and also of the offence of murder. Their appeals to the High Court of Bombay having been dismissed, they appealed to the Supreme Court by special leave.

One of the issues raised in the appeal was the admission of evidence under s 27 of the Indian Evidence Act. The relevant evidence of the investigating officer was that the first accused, Ramkishan, had made a certain statement in consequence of which he (the investigating officer) took the first accused to a place where the first accused pointed out one Baliram who at the instance of the first accused dug out from a mud house a tin box containing three revolvers and two tins containing live cartridges. Arguments turned on the phrases 'in consequence of a certain statement made by the first accused' and 'at the instance of the first accused' in relation to s 27 of the Indian Evidence Act. In the result, it was held on the facts that the operation of s 27 was not attracted and that the evidence was admissible againstthe first accused. Bhagwati J in the course of his discussion on s 27 said (at p 115):

> Section 27, is an exception to the rules enacted in ss 25 and 26 of the Act which provide that no confession made to a police officer shall be proved as against a person accused of an offence and that no confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a magistrate, shall be proved as against such person. Where however any fact is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not.

On the phrase '*whether it amounts to a confession or not,*' Bhagwati J relying on *Pulukuri Kottaya v Emperor* AIR 1947 PC 67 continued (at p 116):

> The expression 'whether it amounts to a confession or not' has been used in order to emphasise the position that even though it may amount to a confession, that much information as relates distinctly to the fact thereby discovered can be proved against the accused. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate — *Pulukuri Kottaya v Emperor* AIR 1947 PC 67.

The appeal, therefore, did not decide on the inter-relation of ss 24 and 27 of the Evidence Act.

In *Vijay Kumar v State of Himachal Pradesh* (1978) Crim LJI 1619, Vijay Kumar was convicted of murder and robbery, and a co-accused was convicted of robbery. There was evidence that Vijay Kumar made a statement leading to the discovery of a sickle said to have been used to commit the murder. The police investigating officer, however, was found to have induced Vijay Kumar into making it. On appeal, the relation between ss 24 and 27 of the Indian Evidence Act (1 of 1872) was in issue. For the respondent, the Advocate-General contended that s 27 served as a proviso to ss 24, 25 and 26 of the said Act and hence even if a s 27 statement leading to discovery was procured by the police under inducement, threat, promise or violence, the statement was saved if it fell within the provisions of s 27

A even though the provisions of s 24 appeared to have been infringed (para 36 at p 1622). Delivering the judgment of the court, Mehta Ag CJ said:

> A close analysis of all these above referred four sections of the Evidence Act will show that s 27 acts as a proviso only to ss 25 and 26 and not to s 24 (para 41 at p 1623).

B After considering the four sections, Mehta Ag CJ further said:

> Thus, s 27 works as a proviso to both the preceding ss 25 and 26. It has no connection with s 24 and it was put in the scheme only because of the special provisions contained in ss 25 and 26 (para 48 at p 1623).

C The learned acting CJ then considered the legislative history of ss 25, 26 and 27 and observed:

> Thus, even without availing of the aid of other reported decisions on this question, we find, on the simple analysis of ss 24 to 27, and the historical background under which ss 25, 26 and 27 were brought in the Evidence Act, that s 27 cannot be said to be controlling the provisions of s 24 of the Indian
D Evidence Act (para 57 at p 1624).

A number of Indian decisions (some conflicting) were then discussed after which Mehta Ag CJ concluded:

> On consideration of all the cases referred to above, and for the reasons already given, we are of the opinion that s 27 controls only the two preceding sections,
E namely ss 25 and 26, and not s 24 of the Evidence Act (para 74 at p 1629).

Mehta Ag CJ then went on to state:

> ... even apart from s 24, s 27 of the Evidence Act contemplates only those statements of the accused which are voluntary in character (para 75 at p 1629).

F He subsequently continued:

> ... s 24 would have operation in spite of the existence of s 27 of the Evidence Act, ...

and further stated that:

G

> ... even if s 24 of the Evidence Act was not in the statute book, this statement being not of the accused should be taken out of consideration (para 76 at p 1629).

We shall revert to this later.

Briefly, while *Ramkishan Mithanlal Sharma v State of Bombay* decided
H that s 27 was a proviso or an exception to ss 25 and 26 without adverting to s 24, *Vijay Kumar v State of Himachal Pradesh* held that s 27 had no connection with (para 48) and did not control s 24 (para 74).

Yee Ya Mang v PP [1972] 1 MLJ 120, did not deal with the inter-relation between s 27 and s 24. *Ramkishan Mithanlal Sharma & Ors v State*
I *of Bombay*, was cited but only in relation to ss 25, 26 and 27.

The ratio in *R v Ramasamy* [1965] AC 1, is on the effect of s 122(3) of the Code of Criminal Procedure 1938 of Ceylon on s 27 of their Evidence

Ordinance 1938. There the Privy Council did not rule that s 27 was subject to the Ceylonese provisions equivalent to our s 24, nor for that matter, to our ss 25 and 26, though the provisions were discussed. A

As for *Packiam & Anor v PP* [1972] 1 MLJ 247, it, likewise, did not deal with the inter-relation between ss 24–26 and s 27. There, the purported s 27 statement of the second appellant in which he said that the stolen property belonged to the first appellant, Packiam, who left it with him for safekeeping, was held inadmissible in evidence since it was not limited to and did not relate distinctly to the fact of discovery. B

In short, it is a matter of construction of ss 24 and 27 as to whether the latter is subject to the former. Apart from *Vijay Kumar v State of Himachal Pradesh*, we feel constrained to hold that all the other cases cited in the above-quoted passages in *Md Desa*, do not support the proposition. It also appears that the decision in *Md Desa*, subjecting s 27 to s 24 cannot have application to a s 27 statement if that statement does not amount to a confession since s 24 relates to confessions. C

Section 27 — Legislative history D

The origin of s 27 of our Evidence Act 1950 may be traced to s 150 of the Indian Criminal Procedure Code (Act XXV) of 1861 which was subsequently amended by Act VIII of 1869. The said amended s 150 of the Indian 1861 Code was transferred to the Evidence Act of India 1872 as s 27. Except for the words 'Provided that' appearing at the commencement of the Indian s 27, our s 27 is substantially the same as the Indian provision. E

Section 27 of the Indian Evidence Act was said to have been adopted from that part of the development in English common law to the effect that those parts of a confession made by an accused leading to the subsequent discovery of facts could be admitted in evidence even though the confession was not voluntarily made, the rationale being that the reliability of the information backed by subsequent discovery justified such admission (see *R v Gould* (1840) 9 C & P 364, 173 ER 870, *Thurtell & Hunt* (1824) Notable British Trials 55 at pp 144–145). In *R v Murugan Ramasamy* [1965] AC 1 Viscount Radcliffe said (pp 14–15): F G

> ... The principle embodied in s 27 has always been explained as one derived from English common law and imported into the criminal law of British India by the legislators of the mid-nineteenth century. It can be traced in English law as early as the late eighteenth century ... .

In England, however, s 76(5) of the Police and Criminal Evidence Act 1984 prohibits the admission of such a statement by an accused unless 'evidence of how it was discovered is given by him or on his behalf.' H

Central issue

Is s 27 of the Evidence Act 1950 subject to s 24 thereof? This is purely a matter of construction of the said two sections. I

Prior to *Md Desa*, the Malaysian courts had persistently held to the effect that s 27 was not subject to s 24 of the Evidence Act. In other words,

A once an information is proved to be within the province of s 27, the trial court would admit it in evidence (see eg *Lee Kok Eng v PP* [1976] 1 MLJ 125 (FC); *PP v Sandra Margaret Birch* [1977] 1 MLJ 129; *PP v Toh Ah Keat* [1977] 2 MLJ 87 (caution not administered under s 113 of the Criminal Procedure Code); *Sum Kum Seng v PP* [1981] 1 MLJ 244 (FC); *Wai Chan Leong v PP* [1989] 3 MLJ 356 (SC) (drug trafficking case — no caution
B administered under s 37A(b) of Dangerous Drugs Act 1952); *Choo Yoke Choy v PP* [1992] 2 MLJ 632 (SC) notwithstanding that the said information might not have been given voluntarily. (See eg *PP v Er Ah Kiat* [1966] 1 MLJ 9; *Chandrasekaran & Ors v PP* [1971] 1 MLJ 153; *Chong Soon Koy v PP* [1977] 2 MLJ 78 (FC)).

C We propose to refer to the dicta or passages in some of the cases cited above.

In the Federal Court appeal of *Lee Kok Eng v PP* [1976] 1 MLJ 125, objection was taken on the admission of certain evidence. Gill Ag LP in delivering the judgment of the court with Ali Ag CJ (Malaya) and Wan
D Suleiman FCJ as members said (at p 127):

> All this was directed to the information which the appellant gave to ASP Ariffin in relation to the discovery of money both in Penang and in Rawang, the car number plates and the shoe box. In our judgment, all such evidence was admissible under s 27(1) of the Evidence Act 1950.

E In *Chong Soon Koy v PP* [1977] 2 MLJ 78 (FC), the appellant gave certain information that led to the discovery of the offensive weapon and the ammunition. The information was given to a police personnel, one Mr Ong Thye Peng who recorded the accused's statement under caution. The appeal proceeded on the basis that the cautioned statement should not have
F been admitted. The Federal Court comprising of Suffian LP, Gill CJ (Malaya) and Wan Suleiman FCJ held that the information supplied by the appellant relating to the discovery of the firearm and the ammunition was admissible in evidence. Delivering the judgment of the court, Suffian LP, applying *Pulukuri Kotayya v King Emperor* AIR 1947 PC 67, 74 IA 65 (PC) said (at p 79):

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> In view of the above authority, all the evidence of Mr Ong's which we have reproduced is admissible and that evidence alone, apart from the cautioned statement, is enough to justify the verdict arrived at by the learned trial judge.

In *Sum Kum Seng v PP* [1981] 1 MLJ 244 (FC), the information supplied by the appellant leading to the discovery of the offensive weapons was in the
H form of an indirect speech. Delivering the judgment of the court, Chang Min Tat FCJ while expressing the desirability of recording the actual words used by an accused person, relied on the *The Queen v Murugan Ramasamy* [1965] AC 1 (PC) and said (at p 245):

> It is clear and beyond argument that the statement of the accused ... was the
I information supplied by the accused that had been the cause of the proven discovery. It was a statement that was clearly admissible, unless it offended against some other statutory provision that would bar its admission.

Chandrasekaran & Ors v PP [1971] 1 MLJ 153 is a corruption case. The cautioned statement of the appellant was ruled inadmissible in evidence on the ground that it had been obtained by compulsion. However, a portion of the statement was admitted by invoking s 27 of the Evidence Ordinance 1950. On appeal, its admissibility was in issue. Raja Azlan Shah J (as he then was) said (at p 158):

> Section 27 is a concession to the prosecution. It is the express intention of the legislature that, even though such a statement is otherwise hit by the three preceding sections, viz ss 24–26 of the Evidence Ordinance, any portion thereof is nevertheless admissible in evidence if it leads to the discovery of a relevant fact. The reason is that, since the discovery itself provides the acid test, the truth of the statement that led to the discovery is thereby guaranteed. Admissibility of evidence under s 27 is in no way related to the making of the confession; rather, such evidence is admitted on clear grounds of relevancy as directly connecting the accused with the object recovered (see *PP v Er Ah Kiat* [1966] 1 MLJ 9). If a statement which would otherwise be hit by s 24 of the Evidence Ordinance is not excluded under s 27, a fortiori a statement which would otherwise be hit by s 15 of the Corruption Act cannot be excluded under s 27 of the Evidence Ordinance, because a statement made under s 15 of the Corruption Act is in the nature of one made under s 24 of the Evidence Ordinance.

In *Wai Chan Leong v PP* [1989] 3 MLJ 356, the Supreme Court comprising of Mohd Azmi, Ajaib Singh and Gunn Chit Tuan SCJJ likewise accepted that s 27 of the Evidence Act 1950 is an exception to, inter alia, s 24 thereof. In the judgment of the court, Gunn Chit Tuan SCJ said (at p 358):

> ... as s 27 is an exception to the prohibition imposed by the preceding ss 24, 25 and 26 of the Evidence Act, it should be strictly construed and applied.

Wai Chan Leong v PP was applied in *Choo Yoke Choy v PP* [1992] 2 MLJ 632 where, delivering the judgment of a differently constituted Supreme Court comprising of Harun Hashim, Mohamed Yusoff SCJJ and Anuar J, Anuar J said (at p 640):

> Under s 27 of the Evidence Act 1950, a statement or information or so much of the information that led to the discovery of the object is admissible. Therefore, the statement or information by the appellant that led to the discovery of the drugs in the kitchen is admissible under this provision of the Evidence Act 1950.

It will thus be seen from the judicial pronouncements that the independence and distinctiveness of s 27 of the Evidence Act 1950 and its being regarded as an exception to s 24 thereof are deeply rooted in our case law, and so far as we are aware, has stood unchallenged for decades.

Next, having regard to the wordings of ss 24 and 27, there is, purely by reason of the language of the two sections alone, no nexus necessitating a determination as to whether one section is subject to or exception to the other. To illustrate, s 25 of the Evidence Act 1950 prohibits (subject to certain exceptions which are of no relevance for our purpose) the use of a confession made to a police officer below the rank of Inspector and s 26 disallows proof of a confession made by a person in the custody of a police officer whereas s 27 permits proof of information, be it amounting to a

confession or otherwise, given by an accused in the custody of a police officer. There clearly is a necessity to determine the independent nature or otherwise of s 27 as against ss 25 and 26. The same, however, cannot be said of s 27 in relation to s 24. Section 27 is silent as to or bears no ligature to the voluntary nature or otherwise of the information. The words 'whether the information amounts to a confession or not' in s 27 relates merely to the character of the information, ie whether it is a confession, or a statement falling short of a confession. In other words, unlike s 27 when compared with ss 25 or 26 of the Evidence Act 1950, a comparison of s 27 and s 24 does not show that they contain any words or phrases bearing or capable of bearing any reference to one another. From the wordings in the two sections, they stand independently of each other.

Furthermore, if s 27 were held subject to s 24, then, logically, it would also be held to be subject to other provisions to the like effect or of similar nature as the said s 24 contained in other enactments, eg s 113 of the Criminal Procedure Code, s 37A of the Dangerous Drugs Act 1952, s 75 of the Internal Security Act 1960, s 15 of the Prevention of Corruption Act 1961 (repealed with effect from 8 January 1998), s 45 of the Anti-Corruption Act 1997. In that case, quite apart from running counter cases like *PP v Sandra Margaret Birch*, and *PP v Toh Ah Keat*, one section in an Act (ie s 27 of the Evidence Act 1950) would be held subject to another section in a *different* Act (eg s 113 of the Criminal Procedure Code, and provisions to the like effect in other Acts). Having regard to the wordings of those provisions in other enactments, which provisions bear no reference to s 27 of the Evidence Act 1950, it would be beyond the function and outside the province of the court so to interpret. Moreover, in *Chandrasekaran & Ors v PP* [1971] 1 MLJ 153 at p 158, Raja Azlan Shah J (as he then was) has attributed the admissibility of s 27 information in evidence to 'the express intention of the legislature', despite its apparent incompatibility with s 24 of the Evidence Act 1950. (The passage is also quoted in the earlier part of this judgment). Yong Pung How CJ (Singapore) in *PP v Chin Moi Moi* [1995] 1 SLR 297 at p 304 adopted the passage which was accepted by our Supreme Court in *Wai Chan Leong v PP*, and said that this would also represent the position in Singapore. If it were indeed the intention of the legislature that s 27 is an independent section — ie that so long as the evidence constitutes 'information' under s 27 relating to facts thereby discovered, it is admissible without the necessity of making reference to s 24 of the same Act, or s 113 of the Criminal Procedure Code (*PP v Sandra Margaret Birch*; *PP v Toh Ah Keat*) or sections with similar effect in other enactments — then all the more reason that any change to clarify the grey area in the law must be left to the legislature.

We are not unaware of the desirability of protecting accused persons against any possible misuse of power by overzealous police personnel whilst under police custody. As Abdul Hamid Omar LP observed in *Pang Chee Meng v PP* [1992] 1 MLJ 137 at p 141:

> ... we are firmly of the view that in invoking s 27, the courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

Indeed, we are in complete agreement, as a matter of policy, with the view expressed in the judgment of this court in *Md Desa*, of the desirability as to the voluntariness of s 27 information. However, due to the lack of language-nexus between s 27 on the one hand and s 24 and comparable provisions in other enactments on the other hand, the apparent intention of the legislature, and the long line of past decisions of our courts not a few of which were from eminent members of the appellate and the highest courts, any departure from the entrenched judicial interpretation laid down in the above quoted and other numerous cases would be a policy decision and should, in our view, be left to the legislature.

Involuntary s 27 information — Admissibility

However, that is not the end of the matter. On the facts of this case, it is, in our view, pertinent to consider whether the s 27 information of the appellant ought, in the interest of justice and in fairness, to have been admitted.

The facts and circumstances giving rise to this question are these. In the course of the trial, the defence took objection to the admissibility of a cautioned statement recorded from the appellant on 30 June 1988. A trial-within-the-trial was held at the end of which the cautioned statement was ruled inadmissible for not having been voluntarily made. The learned trial judge was also highly suspicious as to the voluntariness of the s 27 information given on 24 June 1988. He entertained grave doubt that the appellant would have told the police about the pistol if he (the appellant) had not been tortured, threatened or induced. In fact, the learned trial judge said that there was great possibility that the appellant had been tortured whilst in police custody. Having taken the view that the information was not voluntarily made, should it be admitted?

In this regard, the following passages in the judgment in *Vijay Kumar v State of Himachal Pradesh*, are of great assistance. There Mehta Ag CJ said (at pp 1629–1630 paras 75–76):

> We are further of the opinion that even apart from s 24, s 27 of the Evidence Act contemplates only those statements of the accused which are voluntary in character. It need not be emphasised that if the statement in question is not voluntary and is procured by inducement or threats or by the use of third degree methods, it ceases to be the statement of the accused, and if it ceases to be the statement of the accused it is difficult to comprehend how s 27 would be of any help, because that section makes reference only to the statements which are made by the accused and not by other persons.
>
> If it is held that the police can procure a disclosure statement from the accused under inducements and threats and even by resorting to third degree methods, then it would be easy for an unscrupulous police officer, who has a prior knowledge about the place of concealment of an article which is used during the commission of the offence, to obtain the required statement from the accused who is in his custody and then to utilise it against him during the course of the trial. Such a situation is obnoxious to judicial conscience. If resort can be had to compulsion or inducement in the matter of testimonial utterances, the truth runs the risk of being smothered and the judicial decision which is based on the discoveries which are tainted by falsehoods would never

A be conducive to justice. Therefore, even on a bare reading of the provisions of s 27 we have no doubt in our mind that the statement of the accused contemplated by that section must be a voluntary statement, and not the one which is induced by threat, inducement or third degree methods.

... since the statement induced by the police officer is not voluntary, that statement cannot be considered to be the voluntary statement of the accused B and therefore even if s 24 of the Evidence Act was not in the statute book, this statement being not of the accused should be taken out of consideration. (underlining added).

In *R v Barker* [1941] 2 KB 381 (CCA) (a tax offence case), documents produced by an accused in consequence of inducement held out or made to C him were held inadmissible. Delivering the judgment of the court, Tucker J, recognizing the case raising 'questions of difficulty and importance,' said (at pp 384–385):

... the court is of opinion that if, as a result of a promise, inducement or threat, such books and documents are produced by the person or persons to whom the promise or inducement is held out, or the threat made, those documents D stand on precisely the same footing as an oral or a written confession which is brought into existence as the result of such a promise, inducement or threat.

The result is that, in the opinion of the court, these vital documents and books ... of the appellant, were wrongly admitted in evidence ... .

Although the particular decision in *R v Barker*, was reversed by s 105 of the E Taxes Management Act 1970 (English), the above principle enunciated therein remained valid in England until the coming into force of the Police and Criminal Evidence Act 1984 (English), more particularly ss 76 and 82 thereof. Even then, the same conclusion may be reached in practice under the said 1984 Act.

F *Discretion to exclude evidence*

Apart from the above, has the court the discretion to exclude statement of an accused not voluntarily made?

In West Malaysia, the English common law as administered in England G on 7 April 1956 applies except where other statutory provision has been made. See s 3(1)(a) of the Civil Law Act 1956 which reads:

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —

(a) in West Malaysia or any part thereof, apply the common law of H England and rules of equity as administered in England on the 7th day of April 1956 ... .

The operative part at the commencement of s 3(1), ie: 'Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia,' does not, in our opinion, take away the discretionary power to exclude the confessions in appropriate cases since we, relying on I the cases cited, have accepted that s 24 of the Evidence Act 1950 has no application to s 27 information. That being so, the court is thrown back on its common law powers.

In *Noor Mohamed v The King* [1949] AC 182, Lord du Parcq said (at p 192): A

> ... in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but *cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.* (Emphasis added.) B C

It is clear from His Lordship's judgment (as emphasized) that there is a vested discretion in a trial judge to exclude evidence which is prejudicial to an accused even though the said evidence may be 'technically admissible'. The general pronouncement made in *Noor Mohamed v The King* had been followed in numerous other cases in England and is entrenched in the principle that the English court upholds, which is, it is 'a judge's undoubted duty to ensure that the accused has a fair trial ...' (per Lord Salmon in *R v Sang* [1980] AC 402 at p 445.) D

Noor Mohamed v The King was consistently adopted in Malaysia, see eg *Kan Sik Fong v PP* [1961] MLJ 163; *PP vs Haji Kassim* [1971] 2 MLJ 115 (FC); *Rauf bin Haji Ahmad v PP* [1950] MLJ 190; *Tan Geok Kwang v PP* [1949] MLJ 203. E

In *Kurumason of Kaniu v R* [1955] 1 All ER 236 (PC), Lord Goddard CJ, relying on *Noor Mohamed v R* [1949] 1 All ER 365 at p 370 and *Harris v Director of Public Prosecutions* [1952] 1 All ER 1044 at p 1048 said (at p 239): F

> ... No doubt in a criminal case, the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused.

And he suggested that evidence obtained from an accused, for example, by trick might be excluded.

In our instant case, the learned trial judge had entertained grave doubt as to the voluntariness of the s 27 information of the accused. That being so, it was open to the trial court to exercise its discretion whether to let in the information as part of the trial. The learned trial judge had not exercised the discretion. We are therefore at liberty to exercise. In our view, the principle of fairness requires the discretion to be exercised in excluding the information. G H

Principle of fairness

The essence of natural justice is fairness. The following observation of Lord Diplock in *Haw Tua Tau v PP* [1981] 2 MLJ 49 (PC), though in reference to arts 9(1) and 12(1) of the Constitution of Singapore (similar to arts 5(1) I

A and 8(1) of our Federal Constitution), is of relevance. Lord Diplock said (at p 50):

> ... So no amendment to the Constitution is needed to empower the legislature ... to enact whatever laws it thinks appropriate to regulate the procedure to be followed at the trial of criminal offences ...; subject only to the limitation that ... such procedure does not offend against some fundamental rule of natural justice. It must not be obviously unfair.

B

Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining s 27 information are scrupulously followed in the police station.

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D

Moreover, admitting the appellant's s 27 information would infringe the principle of the right against self-incrimination, there being no evidence of s 112(ii), (iii) and (iv) of the Criminal Procedure Code having been complied with.

E

In short, since the learned trial judge in the instant case under appeal had found that the s 27 information of the appellant was not voluntarily made, it is irrelevant. It was not the appellant's own statement and was extracted from him in contravention of the privilege against self-incrimination and would be unfair to have it admitted against him. The facts and circumstances of the case show that the s 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted it.

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For the aforementioned reasons, we are of the view that the s 27 information of the appellant ought to have been excluded from evidence in the discretion of the court which was not exercised by the trial judge.

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With the exclusion of the s 27 information, we find that there is no or insufficient evidence to justify the conviction of the appellant on the first charge. It will be recalled that we have earlier on quashed the conviction on the second charge. Accordingly and for all the reasons given, we allow the appeal, quash the convictions and set aside the sentence imposed and enter an order of acquittal and discharge in respect of the first and the second charges.

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There remains the question of retrial. We have considered the facts and circumstances of this case including the fact that the alleged offences took place more than 10 years ago, that the appellant had also been under detention and imprisoned for more than a decade and that the only

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evidence against the appellant on the charges was the s 27 information which we have ruled to be inadmissible, the cautioned statement of the appellant made on 30 June 1988 having been rejected at the trial by the learned trial judge. In all the circumstances, we are of the considered opinion that this is not a proper case for ordering a retrial.

Appeal allowed; conviction quashed and sentence set aside.

Reported by Andrew Christopher Simon